Supreme Court, U.S.
FILED
SEP 15 1994
OFFICE OF THE CLERK

No. 94-333

In The

Supreme Court of the United States

October Term, 1994

CSX TRANSPORTATION, INC.,

Petitioner,

v.

DONNIE ADKINS AND ROY L. WAGERS,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

RESPONDENTS' BRIEF IN OPPOSITION

FRANK TUCKER BURGE
Counsel of Record

BURGE & WETTERMARK
2300 SouthTrust Tower
Birmingham, Alabama 35203
(205) 251-9729

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

Whether an occupational disease claim can "accrue" under the FELA before the onset of the disease and at a time when it is unknowable whether the disease will ever develop.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 2

REASONS WHY THE WRIT SHOULD BE DENIED .. 5

I. THE DECISION OF THE GEORGIA SUPREME COURT DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT 5

II. THE DECISION OF THE GEORGIA SUPREME COURT DOES NOT CONFLICT WITH ANY DECISION OF ANY UNITED STATES COURT OF APPEALS OR ANY OTHER STATE COURT OF LAST RESORT 13

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

Albertson v. T. J. Stevenson & Co., 749 F.2d 223 (5th Cir. 1984) 15, 16, 17

Associated Indemnity Corp. v. Industrial Accident Commission, 12 P.2d 1075 (Cal. 1932) 6

Bowles v. CSXT, 206 Ga.App. 6, 424 S.E.2d 313 (1992) 11

Braen v. Pfeiffer Oil Tran. Co., 361 U.S. 129 (1959) 16

Dubose v. Kansas City Southern R. Co., 729 F.2d 1026 (5th Cir.), cert. den., 469 U.S. 854 (1984) 8

Fries v. Chicago & N.W. Transp. Co., 909 F.2d 1092 (7th Cir. 1990) 14, 15

Jones v. Maine Central R. Co., 690 F.Supp. 73 (D.Me. 1988) 15

Kitchline v. Consolidated Rail Corp., 800 F.2d 356 (3rd Cir. 1986) 14

McCoy v. Union Pacific RR Co., 796 P.2d 646 (Ore. Ct. App. 1990) 15

Schwitzer v. Consolidated Rail Corp. (Conrail), 758 F.2d 936 (3rd Cir. 1985), cert. den., 474 U.S. 864 (1985) 12, 13

Sentiles v. Inter-Caribbean Shipping Corp., 361 U.S. 107 (1959) 16

Smith v. States Marine International, 864 F.2d 410 (5th Cir. 1989) 18

Taurel v. Central Gulf Lines, Inc., 947 F.2d 769 (5th Cir. 1991) 18

TABLE OF AUTHORITIES – Continued

Page

United States v. Kubrick, 444 U.S. 111 (1979) 7, 8, 10, 18

Urie v. Thompson, 337 U.S. 163 (1949)..... *passim*

Young v. Clinchfield RR Co., 288 F.2d 499 (4th Cir. 1961)..... 14

No. 94-333

In The

Supreme Court of the United States

October Term, 1994

CSX TRANSPORTATION, INC.,

Petitioner,

v.

DONNIE ADKINS AND ROY L. WAGERS,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondents, Donnie Adkins and Roy L. Wagers, respectfully request that this Court deny the Petition for Writ of Certiorari submitted by the Petitioner, CSX TRANSPORTATION, INC.

STATEMENT OF THE CASE

Respondents Donnie Adkins and Roy Wagers worked as electricians for Petitioner CSXT for many years.[1] Degreasing locomotive electrical parts was one of their primary duties throughout their careers. This task was accomplished by spraying the part with solvent. The solvents used were volatile chlorinated hydrocarbons. These solvents are toxic with chronic overexposure [Adkins R. 467-468; Wagers R. 396-397].[2] The toxic nature of these chemicals has been well-known in the medical field for many years and was well-known before these men began working for the railroad. [*Id.*] For these reasons solvent manufacturers recommended safety precautions with the use of these chemicals [Adkins R. 410]. These safety precautions were never followed by CSXT. CSXT never informed the Respondents of the dangers of these materials [Adkins R. 402; Wagers R. 325, 418]. On the contrary, the railroad represented to the Respondents that the solvents were safe to use. [*Id.*] The Respondents now suffer an occupational brain disease as the cumulative result of their years of unprotected exposures to toxic degreasing solvents throughout their careers [Adkins R. 77, 404 and 406; Wagers R. 328 and 329].

The occupational brain disease is known as toxic encephalopathy. [*Id.*] It is an organic brain disease which is purely latent in nature [Adkins R. 404-407; Wagers R.

---

[1] Mr. Wagers worked for the Petitioner from October 1969 to October 1990. Mr. Adkins was employed from July 1971 to April 1991.

[2] Record references are to the record on appeal to the Supreme Court of Georgia.

328, 328-A, 329 and 331]. The symptoms of this disease are memory loss, depression, confusion, personality changes, fatigue, weakness and balance difficulties [Adkins R. 404-407; Wagers R. 328, 328-A, 329, 331 and 394]. Both of the medical specialists who have testified in these cases agree that until these symptoms of this occupational disease became manifest it is "unknowable" whether an exposed individual will ever contract the illness. [*Id.*] The first time that Mr. Adkins noticed any symptoms of this occupational disease was in early 1990 [Adkins R. 250]. Mr. Wagers first noticed symptoms in 1989 [Wagers R. 275, 276 and 325].

When their symptoms began, neither Respondent had any idea what was wrong with him. Each went to his family doctor, but the doctors were unable to identify either the condition or its cause [Adkins R. 267-268, 276]. It was not until these men were seen and treated by Dr. Michael Kelly, a board certified specialist in occupational medicine, that the disease was discovered and its cause revealed to the Respondents [Adkins R. 402; Wagers R. 325]. Dr. Kelly discovered the Respondents' disease and its cause in 1990 [Adkins R. 405; Wagers R. 328-328A]. These lawsuits were filed in September 1990. In addition to Dr. Kelly, these men have been examined and evaluated by Dr. Douglas Linz. Dr. Linz is also a board certified specialist in occupational medicine. He teaches occupational medicine at the University of Cincinnati Medical School. CSXT sent the Respondents to Dr. Linz for independent medical evaluations. Dr. Linz agreed with Dr. Kelly's diagnosis of an organic occupational brain disease secondary to the chronic overexposure to solvents [Adkins R. 406; Wagers R. 329]. **Importantly,**

both of these medical specialists agree that the onset of the Respondents' occupational diseases occurred within the three years before their lawsuits were filed[3] [Adkins R. 405-406; Wagers R. 328, 328A, 329]. **Both agree that the Respondents had suffered no solvent related injury before the onset of these symptoms and that the symptoms of exposure that these men experienced when spraying the solvent were neither injuries nor early symptoms of their occupational illness**[4]. [*Id.*]

CSXT moved for summary judgment claiming that the Respondents' actions are barred by the FELA's three year statute of limitations. CSXT claimed that the Respondents were injured and their claims for their occupational disease accrued at the time of their exposure to the solvents. CSXT produced no medical testimony in support of its contentions that the Respondents were injured at the time of their exposures or that the onset of the Respondents' occupational disease occurred more than three years before these lawsuits were filed. The trial court, the Georgia Court of Appeals and the Georgia Supreme Court all correctly held that these claims are not time barred. Each court unanimously found that these occupational disease claims did not accrue until the Respondents possessed the critical facts of their injury and its cause after seeing Dr. Kelly in 1990.

---

[3] The Petition fails to mention this unrebutted medical testimony.

[4] The Petition fails to mention that both medical specialists have refuted CSXT's contention that the symptoms of exposure were actual injuries.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THE DECISION OF THE GEORGIA SUPREME COURT DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT.

This case presents no novel question of law. It is the application of disputed facts to the accepted legal standard for determining when the Respondents' occupational disease had its onset and when it became knowable which is at the heart of this Petition.

CSXT seeks a writ of certiorari on the issue of whether the Respondents' FELA claims for their occupational disease are time barred. CSXT argues that the Respondents' claims accrued at the moment that they were exposed rather than when the onset of their occupational disease occurred. This contention that the employee is "injured" at the time of exposure rather than at the time of the onset of an occupational disease has already been addressed and rejected by this Court. Under the applicable Supreme Court authorities the "discovery rule" controls the determination of when an occupational disease accrues under the FELA.

This Court first recognized that railroad employees could recover for occupational diseases under the FELA in *Urie v. Thompson*, 337 U.S. 163 (1949). Urie, the employee, sued under the FELA for silicosis which he claimed was the result of his exposure to excessive levels of silica dust throughout his many years of employment with the railroad. The defendant railroad claimed that Urie's action was barred by the statute of limitations. *Urie*, 337 U.S. at 169. The railroad argued in its brief that

Urie was injured at the time of his exposure to the silica dust "even though the development of consequential damages may be long delayed and even though the employee does not know of his injury." *Urie*, 93 L.Ed. 1282 at 1289. Since Urie's exposures occurred more than three years before the claim was filed, the railroad contended that the action was time barred. This is the identical argument that CSXT makes in this Petition. Rejecting this argument, the Court held that Urie's occupational disease claim was not time barred. *Urie*, 337 U.S. at 170. The Court adopted what has come to be known as the "discovery rule" for determining when a occupational disease accrues under the FELA:

> "It follows that no specific date of contact with the substance can be charged with being the date of injury, inasmuch as the injurious consequences of the exposure are the product of a period of time rather than a point of time; consequently **the afflicted employee can be held to be "injured" only when the accumulated effects of the deleterious substance manifest themselves**. . . . "

Id. (quoting *Associated Indemnity Corp. v. Industrial Accident Commission*, 12 P.2d 1075, 1076 (Cal. 1932)) [emphasis supplied].

Holding that an employee is not "injured" until the accumulated effects of his exposures have resulted in occupational disease fulfills the FELA's humanitarian purpose. This Court acknowledged that it would be unjust to bar a railroad worker's occupational disease before the onset of the condition:

> If Urie were held barred from prosecuting this action because he must be said, as a matter of law, to have contracted silicosis [more than three years before suit was filed], it would be clear that the federal legislation afforded Urie only a delusive remedy. It would mean that at some past moment in time, unknown and inherently unknowable even in retrospect, Urie was charged with knowledge of the slow and tragic disintegration of his lungs; under this view Urie's failure to diagnose within the applicable statute of limitations a disease whose symptoms had not yet obtruded on his consciousness would constitute waiver of his right to compensation at the ultimate day of discovery and disability.

Id. at 169. This Court did not "think the humane legislation plan [FELA] intended such consequences to attach to blameless ignorance." *Id.* at 170.

This Court reaffirmed its position that unknown and unknowable injuries do not start the statute of limitations in *United States v. Kubrick*, 444 U.S. 111 (1979). Kubrick sued under the Federal Tort Claims Act (FTCA) to recover for a hearing loss caused by alleged negligent drug treatment he underwent in a Veteran's Administration hospital in 1968. His physician informed him in January 1969 that it was highly probable that this drug treatment caused his hearing loss. His FTCA claim was filed in 1972. The Court found that Kubrick's claim was barred by the FTCA's two year statute of limitations. The Court held that the claim accrued in January 1969 when the physician had diagnosed Kubrick's condition and related it to the drug treatment. In response to Kubrick's argument that his action did not accrue until he learned

that the treatment he received was negligent, the Court distinguished between a plaintiff's ignorance of his injury or its cause and his ignorance of his legal rights saying:

> We are unconvinced that for statute of limitation purposes a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should be given identical treatment. **That he has been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain.** The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury. He is no longer at the mercy of the latter.

Kubrick, 444 U.S. at 122 [emphasis supplied].

The Georgia Supreme Court's decision in these cases is not in conflict with either *Urie* or *Kubrick*. The Georgia Supreme Court applied the discovery rule. It stated the rule as follows: "A claim accrues under FELA when the plaintiff possesses sufficient critical facts from which the injury and its cause, including its work-relatedness, should be plainly known. *Dubose v. Kansas City Southern R. Co.*, 729 F.2d 1026 (5th Cir.), cert. den., 469 U.S. 854 (105 SC 179, 183 L.Ed.2d 113) (1984)." CSXT does not contend that the Georgia Supreme Court's statement of the discovery rule is flawed; it is the application of the rule to the facts in these cases with which CSXT takes exception. CSXT argues that under the facts of these cases the Georgia Supreme Court was compelled to find that the plaintiffs were injured and their actions accrued at the time that these men were exposed to the degreasing solvents

and experienced exposure symptoms. This argument is factually and legally flawed.

In order for CSXT to prevail the Court would have to ignore the testimony of the medical specialists who have testified in these cases. It is these specialists, including CSXT's hand-picked expert, and not the Georgia Supreme Court, who distinguished the employees' symptoms of exposure from symptoms of their occupational disease. It is these doctors who explained in their affidavits that symptoms of exposure are not injuries. They testified that this occupational disease is purely latent such that it is "unknowable" whether exposures will ever lead to any occupational disease until the symptoms of the occupational disease manifest themselves. Finally, it is these specialists who unequivocally place the onset of the Respondents' latent occupational disease within the three year period before their lawsuits were filed. That the Georgia Supreme Court reached its decision based upon the testimony of these specialists is evident from the text of the opinion:

> This argument[5], as the [Georgia] Court of Appeals found, fails to recognize the medical distinction between temporary symptoms of non-injurious exposure, and the other and different symptoms of permanent brain disease. The plaintiff's medical expert testified by affidavit that the symptoms of exposure were not injuries and are not the same as the symptoms of toxic encephalopathy, a disease which is

---

[5] CSXT's argument that these actions are time-barred because the employees experienced exposure symptoms when using solvents more than three years before the suits were filed.

> purely latent. An individual may suffer symptoms of exposure for years without or before developing this chemically caused injury or disease. While we disagree with the suggestion by the [Georgia] Court of Appeals that the existence of a medical diagnosis is necessary for one to be charged with knowledge of an injury and its cause[footnote omitted], **the evidence in this case was sufficient to authorize a jury to find that Adkins and Wagers did not possess all the critical facts necessary to recognize injury and causation until they were examined and diagnosed by a physician.**

CSX Transportation, Inc. v. Adkins, et al., at A-2 in the Petition [emphasis supplied].

Neither *Urie* nor *Kubrick* stand for the proposition that an occupational disease claim can accrue before the disease develops or at a point in time when it is unknowable whether it ever will. In fact these cases hold just the opposite. It is a commonplace of occupational medicine that one cannot possess all of the critical facts of an occupational disease before it develops. Likewise, it is common sense that one cannot possess all of the critical facts from which one should plainly know of an occupational disease at a point in time when it is unknowable whether the disease will ever develop. That is the reason the Court in *Urie* held that a railroad employee is not legally "injured" until the symptoms of his occupational disease manifest themselves. The occupational disease in these cases is toxic encephalopathy. It is a purely latent condition. The Respondents were not "injured" with this

condition until they developed symptoms of this condition. The doctors agree that these symptoms began within the limitations period.

The medical testimony which the Georgia Supreme Court found to be dispositive of CSXT's motion for summary judgment is not addressed by CSXT in its Petition. CSXT does not address the medical testimony in the record because none of it supports its contention that the symptoms of exposure that these men experienced were injuries. Instead, CSXT offers a false analogy, unsupported in fact. There are two reasons this approach fails. First, CSXT's comparison of the symptoms of exposure to those of concussion is insufficient as a matter of law. Analogies are no substitute for evidence. The record contains no testimony supporting CSXT's analogy. Whether these symptoms are or are not injuries is undeniably a medical question. Such questions cannot be resolved without expert medical testimony. "[E]xpert testimony is required where the disposition of a 'medical question' controls the resolution of a case." *Bowles v. CSXT*, 206 Ga.App. 6, 424 S.E.2d 313 (1992). Secondly, the only evidence involving a comparison of these exposure symptoms refutes CSXT's characterization and, thus, highlights the existence of a factual dispute. Dr. Kelly likens the exposure symptoms to the tears one gets when chopping an onion. The tears are a symptom of exposure to the onion but not of injury. The cook has not been injured in the slightest [Adkins R. 405; Wagers R. 328 and 328-A].

CSXT desperately attempts to distinguish the Adkins and Wagers cases from *Urie* by stating that *Urie* involved a case wherein the plaintiff did not know that he had

been exposed to silica dust. In truth, the opinion does not address the fact of whether Urie was or was not aware of his exposure, for this fact is irrelevant to the holding. The FELA compensates railroad employees for injuries and not for exposures. It is the unknowable nature of Urie's occupational disease that the Court addressed, not his exposures. If CSXT's position were correct, every employee who was knowingly exposed to solvents, asbestos, silica sand, coal dust, noise, or any other hazardous substance or condition capable of causing a latent occupational disease would have to file an action for the disease at the time of each exposure even though it was impossible to know at that time if the disease would ever develop. It would be the potential for developing the disease which would become actionable and compensable under the FELA rather than the disease itself. This argument is incompatible with the *Urie* requirement that the statute of limitations only begins to run "when the accumulated effects of the deleterious substance manifest themselves." *Urie*, 337 U.S. at 170. In fact, this Court rejected this "breath by breath" accrual analysis in *Urie* as a purely "mechanical analysis" calculated only "to thwart the congressional purpose" of the FELA. *Urie*, 337 U.S. at 169.

Mr. Adkins and Mr. Wagers did not have a cause of action for occupational brain disease as a matter of law before their symptoms of toxic encephalopathy manifested themselves. In *Schwitzer v. Consolidated Rail Corp. (Conrail)*, 758 F.2d 936 (3rd Cir. 1985), cert. den., 474 U.S. 864 (1985), the Court of Appeals for the Third Circuit addressed the degree of injury necessary to maintain a FELA action for an occupational disease. The court held

that subclinical injury is insufficient to maintain a FELA action for a latent occupational disease. The Court explained its decision as follows:

> [S]ubclinical injury resulting from exposure . . . is insufficient to constitute the actual loss or damage to a plaintiff's interest required to sustain a cause of action under generally applicable principles of tort law.
>
> Moreover, we are persuaded that a contrary rule would be undesirable. . . . If mere exposure to asbestos were sufficient to give rise to a FELA cause of action, countless seemingly healthy railroad workers, workers who might never manifest injury, would have tort claims cognizable in federal court. It is obvious proof of damages in such cases would be highly speculative, likely resulting in windfalls to those who never take ill and insufficient compensation for those who do. Requiring *manifest injury* . . . avoids these problems and best serves the underlying purpose of tort law; the compensation of victims who have suffered.

Schwitzer, 758 F.2d at 942 [emphasis supplied]. This statement succinctly explains and validates the rationale of *Urie*'s manifest injury requirement and lays to rest CSXT's argument.

II.

THE DECISION OF THE GEORGIA SUPREME COURT DOES NOT CONFLICT WITH ANY DECISION OF ANY UNITED STATES COURT OF APPEALS OR ANY OTHER STATE COURT OF LAST RESORT.

There is no conflict among the circuits or states regarding the proper standard for determining when a

latent occupational disease action accrues under the FELA. All are bound by and follow Urie's discovery rule. Under this two-prong rule, an FELA claim for an occupational disease accrues when the employee becomes aware of both his condition and its cause. *Young v. Clinchfield RR Co.*, 288 F.2d 499 (4th Cir. 1961); *Kitchline v. Consolidated Rail Corp.*, 800 F.2d 356 at 358 (3rd Cir. 1986). The Georgia Supreme Court applied this two-prong discovery rule in these cases. Issues of fact compelled its decision finding that these claims were timely filed. Viewing the facts in the light most favorable to the Respondents, reasonable and fair-minded jurors could conclude from the facts in the record that the onset of the employees' occupational disease took place within the three years before their suits were filed; that the first time Mr. Wagers noticed any symptoms of his occupational disease was in 1989 and for Mr. Adkins the first symptoms began in 1990; that the first time they knew or suspected that they were suffering from a work-related condition was after Dr. Kelly reached his diagnosis in 1990.

Fries v. Chicago & N.W. Transp. Co., 909 F.2d 1092 (7th Cir. 1990), cited by CSXT in the Petition, requires the same result. In that case, the Seventh Circuit Court of Appeals applied the *Urie* two-prong discovery rule to the facts of an occupational hearing loss claim. The claimant in *Fries* admitted that he had suffered a hearing loss by 1981 or 1982. Because he did not file his FELA action until 1987, the Court held that his claim was time-barred stating:

> In sum, our application of the principles outlined above [the *Urie* and *Kubrick* discovery rule principles] to the question of when Fries' action

> accrued dictates a finding that the statute of limitations ran in 1984, three years after Fries knew, or should have known in the exercise of reasonable diligence, of both his injury and its cause. Fries began work for the railroad in 1969 and, although he alleges in his complaint that he was exposed to injurious noises since that time, the clock did not begin running on his FELA claim until the injury manifests itself and he should have reasonably known its cause in 1981.

Fries, 909 F.2d at 1097. Thus, it is the facts rather than the standard for determining accrual which distinguishes the Georgia Supreme Courts' decision in these cases from *Fries*. Fries' hearing loss manifested itself more than three years before his suit was filed by his own admission, while the Respondents' testimony and that of the medical specialists place the onset of their occupational disease within the three years before their cases were filed. *Fries* does not hold that a cause of action for a latent occupational disease accrues prior to the onset of that condition or at a point in time when it is unknowable whether it ever will develop. That the application of the discovery rule is highly fact sensitive is well recognized, and courts "must be attentive that no genuine issues remain." *Jones v. Maine Central R. Co.*, 690 F.Supp. 73, 75 (D.Me. 1988). "Ordinarily, the question of whether and when an employee knew or should have known that he had an occupational disease is one of fact for the jury." *McCoy v. Union Pacific RR Co.*, 796 P.2d 646, 648 (Ore. Ct. App. 1990).

Albertson v. T.J. Stevenson & Co., 749 F.2d 223 (5th Cir. 1984), is the other case cited by CSXT in its Petition as supporting its contention that the Georgia Supreme Court

wrongly applied the discovery rule in these actions. *Albertson* is both factually and legally distinguishable from *Adkins* and *Wagers*. *Albertson* involved a traumatic injury rather than a latent occupational disease. *Albertson* does not involve the application of the discovery rule. Albertson, a seaman, was rendered unconscious on multiple occasions during a four-month voyage in 1969 by a chemical he knew to be dangerous. Immediately after his last blackout Albertson began suffering headaches so severe that strong pain medication failed to allay them. He went to medical specialists right away for his problems and was hospitalized. During the hospitalization he underwent an EEG which revealed an abnormal brain wave pattern. After his hospitalization Albertson's doctor refused to certify him as being fit for sea duty, and he never worked aboard a ship again. Albertson's problems continued and intensified after his discharge from the hospital. His problems became so severe and intolerable that in 1972 Albertson attempted suicide by shooting himself in the head. He underwent two brain operations as a result of the gunshot wounds. Albertson was hospitalized on several occasions between his 1969 exposures and 1981, when he filed his lawsuit under the Jones Act[6] seeking compensation for the problems he had suffered

---

[6] 46 U.S.C. app. § 688 (1988). "The Jones Act extended to maritime workers the negligence remedy provided for interstate railroad workers by the Federal Employers' Liability Act." Braen v. Pfeiffer Oil Tran. Co., 361 U.S. 129, 135 (1959) (Harlan, J., concurring in part and dissenting in part). Cases decided under the Jones Act are *in pari materia* with cases decided under the FELA. *See* Sentiles v. Inter-Caribbean Shipping Corp., 361 U.S. 107 (1959).

since 1969. The defendant's motion for summary judgment was granted by the trial court and the Fifth Circuit Court of Appeals affirmed. Because Albertson knew that he had suffered a substantial injury at the time of his exposure the Court refused to apply the discovery rule stating:

> Albertson's case is different from these typical cases in which the discovery rule is applied. Albertson knew both that he was injured and the cause of his injury at the time of the injury in 1969. After his last exposure to the [toxic substance], Albertson lost consciousness, was administered minor medical care, and endured an excruciating headache for the remainder of the voyage. He informed his superiors that he would not apply the [toxic substance] again, indicating his awareness of the cause of his injury. His medical condition was so severe after he returned to land that he was soon thereafter decertified as being fit for sea duty, and he never served on board a vessel again. These facts make clear that Albertson's is not a pure latent injury case. The discovery rule cannot justify his failure to file suit for over twelve years.

Albertson, 749 F.2d at 231. These facts are not similar to those in Adkins and Wagers which do involve purely latent injuries. The *Albertson* decision does not support the premise that a purely latent injury accrues at the time of exposure, but expressly rejects it:

> This is not a case in which, coinciding with the trauma, an injured seaman experienced and noticed only a minor injury and at a later time discovered an unexpected latent injury that was

> unknown and unknowable at the time of the traumatic event.

Id. at 233.

The Petition does not confront the Court with a situation in which these claims are time-barred in one circuit or state but not in another. In cases involving latent injuries which are unknown and unknowable at the time of exposure, the Fifth Circuit has consistently applied the discovery rule just as the Georgia Supreme Court did in these actions. See, e.g., *Smith v. States Marine International*, 864 F.2d 410 (5th Cir. 1989); *Taurel v. Central Gulf Lines, Inc.*, 947 F.2d 769 (5th Cir. 1991).

The Respondents' injuries were purely latent and were unknowable until their symptoms manifested themselves within the limitations period; consequently, their claims are timely under the discovery rule regardless of where the rule is applied. Neither the Fifth Circuit, nor the Seventh Circuit, nor any other circuit or state applies the discovery rule so as to bar occupational diseases before their onset or at a point in time when it is unknown and unknowable whether the condition ever will manifest. To do so would be error in light of this Court's decisions in *Urie* and *Kubrick*.

CONCLUSION

The Petition does not present this Court with any significant conflict with any decision of this Court or between the circuits or state courts of last resort, with any fundamental error below, or with any other compelling reason to grant the writ. Consequently, the Petition is due to be denied.

Respectfully submitted this 15th day of September, 1994.

FRANK TUCKER BURGE
Counsel of Record

BURGE & WETTERMARK
2300 SouthTrust Tower
Birmingham, Alabama 35203
(205) 251-9729

Counsel for Respondents